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No. 91-75

In the Supreme Court of the United States

OCTOBER TERM, 1991

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review in vacating the arbitrator's decision that a grievance was arbitrable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 922 F.2d 256. The order of the district court (Pet. App. 10a-13a) is unreported. The arbitration award (Pet. App. 15a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1991. A petition for rehearing was denied on February 26, 1991. Pet. App. 25a. On April 29, 1991, the time for filing a petition for a writ of certiorari was extended to June 21, 1991, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 15, 1986, Darel A. Smith was hired as a distribution clerk by the United States Postal Service. He was required to serve a 90-day probationary period. In Smith's 30-day evaluation, his supervisor said that Smith was failing to meet expectations, but did not recommend termination. Pet. App. 2a. On April 19, 1986, however, Smith's supervisor did recommend termination "for failure to follow the instructions of his supervisor." *Id.* at 19a. Before the Postal Service could act on the recommendation, Smith suffered injuries in a work-related car accident and was placed on "compensable leave" under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* Pet. App. 2a. On May 15, 1986, while Smith was still on leave and before the end of his 90-day probationary period, the Postal Service terminated Smith's employment based on his "unsatisfactory performance as a Postal employee." Pet. App. 2a, 17a.

Petitioner then filed a grievance on Smith's behalf contesting his termination. Pet. App. 11a. Petitioner claimed that Smith was terminated because of work-related injuries, in violation of FECA, its implementing regulations, and petitioner's collective bargaining agreement with the Postal Service (the National Agreement). The Postal Service responded that the arbitrator had no authority to hear that grievance because the National Agreement expressly bars a probationary employee from contesting his discharge through the grievance procedure. *Id.* at 2a, 18a. The Postal Service relied on Article 12.1.A of the National Agreement, which provides

> The probationary period for a new employee shall be ninety (90) calendar days. The Em-

> ployer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto.

Pet. App. 18a.

The arbitrator stated that the case presented two issues: (1) whether the grievance is arbitrable, and (2) whether the termination of Smith was improper, and, if so, what remedy was appropriate. Pet. App. 16a. Although the arbitrator did not explicitly address the threshold question of arbitrability, he did find that federal law and the National Agreement gave Smith the right to resume work after recovering from his compensable injury and that the grievance should therefore be sustained. *Id.* at 21a-24a. The arbitrator directed the Postal Service to reinstate Smith to his position as a probationary employee. *Id.* at 15a.

2. The Postal Service challenged the award pursuant to 39 U.S.C. 1208(b), and the district court vacated it. The court noted "[a]lthough the arbitrator may have implicitly considered the issue of arbitrability, his determination is not absolutely immune from judicial review." Pet. App. 12a. Rather, "[i]f the arbitrator exceeded his authority under the collective bargaining agreement," the award may be set aside. *Ibid.* The court then found that Article 12.1.A of the National Agreement precludes probationary employees from filing a grievance over their termination. Accordingly, the court held that "[t]he arbitrator clearly exceeded his autohrity" in reaching the merits of the grievance. Pet. App. 12a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court noted that "[t]o encourage the private res-

olution of labor disputes, courts pay considerable deference to the merits of an arbitrator's award." *Id.* at 4a, citing *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29 (1987). Nevertheless, the court stated, "[w]here the arbitrator exceeds the express limitations of his contractual mandate, judicial deference is at an end." Pet. App. 4a, citing *Delta Queen Steamboat Co.* v. *District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), cert. denied, 111 S. Ct. 148 (1990). Applying those principles, the court found that the "crucial issue in this case is whether the arbitrator had jurisdiction to hear Smith's grievance." Pet. App. 4a.

Reviewing the provisions of the National Agreement, the court noted that, notwithstanding a claim that the Postal Service had violated other provisions of the agreement, Article 12 "clearly denies probationary employees any right to resort to grievance and arbitration procedures." Pet. App. 6a. "The language of article 12 is * * * clear and unequivocal" in denying probationary employees access to the grievance process. *Ibid.* The court added that the arbitrator "did not expressly find, nor could he have found" that the provisions of the agreement that were allegedly violated give probationary employees the right to arbitrate a termination decision. *Id.* at 7a. Nor was the arbitrator's decision unreviewable because of Article 15.A.4.9, which provides that the decision on an arbitrability dispute that the parties submit to the arbitrator "shall be final and binding." Pet. App. 3a-4a, 8a. "Article 12 does not permit the arbitrator ever to reach the question of arbitrability when the dismissal at issue involves probationary employees." *Id.* at 8a. Thus, the court concluded, an

arbitrator who does so "clearly exceeds his authority." *Ibid.*[1]

ARGUMENT

1. Petitioner contends (Pet. 11-18) that there is a conflict in the circuits with respect to the standard of review that applies to an arbitrator's determination of arbitrability. Specifically, in petitioner's view, other circuits give deference to an arbitrator's decision regarding arbitrability when the parties have agreed to submit that issue to the arbitrator, while the Fifth Circuit declines to give such deference. Petitioner's claim of a conflict is incorrect.

In the labor context, "courts play only a limited role when asked to review the decision of an arbitrator." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. at 36. In keeping with the federal policy in favor of private dispute resolution, when the arbitrator's decision "draws its essence" from the agreement, rather than from the arbitrator's "own brand of industrial justice," courts must enforce the award. *Ibid.*, quoting *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). The question of arbitrability is for the court to decide unless the parties "unmistakably provide otherwise." *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1986). When the parties have committed the issue of arbitrability to the arbi-

[1] The court noted that its holding that Smith's grievance is not arbitrable does not foreclose him from pursuing a remedy before the Merit Systems Protection Board if his rights under federal law were violated. "If [Smith] can show that his firing resulted from a compensable injury or was substantially related to one, a probationary employee is entitled to appeal a denial of reinstatement to the MSPB." Pet. App. 8a.

trator, however, the courts of appeals have held that same deferential standard of review that applies to the arbitrator's determination on the merits also applies to his arbitrability decision. See *Pennsylvania Power Co.* v. *Local 272, IBEW*, 886 F.2d 46, 48 (3d Cir. 1989); *Vic Wertz Distrib.* v. *Teamsters Local 1038*, 898 F.2d 1136, 1140 (6th Cir. 1990); *George Day Constr. Co.* v. *United Bhd. of Carpenters Local 354*, 722 F.2d 1471, 1476-1477 (9th Cir. 1984); *Franklin Elec. Co.* v. *UAW*, 886 F.2d 188, 192 (8th Cir. 1989); *Berklee College of Music* v. *Berklee Chapter of Mass. Fed'n of Teachers, Local 4412*, 858 F.2d 31, 34 (1st Cir. 1988), cert. denied, 110 S. Ct. 53 (1989).[2]

A deferential reviewing standard, however, does not mean total abdication of review. Courts may enforce the requirement that "[t]he arbitrator may not ignore the plain language of the contract." *Misco*, 484 U.S. at 38. In *Pennsylvania Power*, for example, the court ordered the vacation of an arbitrator's decision on arbitrability because "the arbitrator wholly eschewed reliance on the language of the parties'

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[2] Contrary to petitioner's contention (Pet. 13), the First Circuit does not give greater deference; the court expressly indicated in *Berklee College of Music* that it applies a standard of review derived from *Misco*. 858 F.2d at 34. Nor is petitioner correct in suggesting (Pet. 13-14) that the Seventh Circuit applies a more deferential standard. In *Jones Dairy Farm* v. *Local P-1236*, 760 F.2d 173, 176, cert. denied, 474 U.S. 845 (1985), the court held that a party could not challenge the arbitrator's jurisdiction because it had never raised that issue before the arbitrator, but instead "submitt[ed] without a peep to the arbitrator's jurisdiction." The Postal Service did not waive its jurisdictional objection here; one of the issues submitted to the arbitrator was "[w]hether the instant grievance is arbitrable." Pet. App. 16a.

agreement in arriving at his decision," and, "in ignoring [the relevant provisions] and finding arbitrability, the arbitrator exceeded his authority." 886 F.2d at 49. In *Vic Wertz Distrib.*, the court upheld the arbitrator's decision on arbitrability only after noting that the arbitrator had not "disregarded plain and unambiguous provisions which would have mandated a contrary result." 898 F.2d at 1142. And in *Berklee College of Music*, the court upheld an arbitrator's "plausible" finding that he could overlook the lateness of a grievance despite contrary indications in the text of the agreement. The court noted, however, that under *Misco*, a court may set aside a decision on arbitrability where the contract language defining the arbitrator's authority could not have been "express[ed] more clearly." 858 F.2d at 34, citing *S.D. Warren Co.* v. *United Paperworkers Int'l Union*, 846 F.2d 827, 828 (1st Cir. 1988) (setting aside award).

In this case, the court of appeals employed the same approach. Petitioner claims (Pet. 15) that the court of appeals announced a different standard of review for merits decisions than for arbitrability decisions. The court's brief discussion of its standard of review, however, did not draw that distinction. The court stated that "considerable deference [is given] to the merits of an arbitrator's award," Pet. App. 4a (citing *Misco*, *supra*), but enforcement will be denied where "the arbitrator has exceeded his authority under the collective bargaining agreement." *Ibid.* In noting that judicial deference to the arbitrator's determination ends "[w]here the arbitrator exceeds the express limitations of his contractual mandate," *ibid.*, the court simply indicated that an arbitrator's decision cannot override "clear and unequiv-

ocal" requirements of a contract. *Id.* at 6a. That test fully accords with the standard employed in other circuits; it measures the arbitrator's action in light of express contractual mandates. An arbitrator's determination that exceeds the express limitations of a contract is not one that "draws its essence" from that agreement. *Misco*, 484 U.S. at 36.[3]

2. In any event, this case does not squarely present any issue with respect to the appropriate degree of deference. Even assuming that the court of appeals should have given more deference to the arbitrator's determination of arbitrability, the arbitrator's award was properly vacated in this case because it could not "rationally be derived from the collective bargaining agreement." *Pennsylvania Power*, 886 F.2d at 48.

In this case, the arbitrator did not expressly address the issue of arbitrability. Indeed, it is not clear that he had any theory concerning why Smith's grievance was arbitrable.[4] But as the court of appeals

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[3] As petitioner notes (Pet. 15), there is language in *Container Prods., Inc.* v. *United Steelworkers*, 873 F.2d 818, 820 (5th Cir. 1989), implying that the court construed this Court's decision in *Misco* as an "admonition concerning the merits of the controversy rather than any jurisdictional prerequisites imposed by the arbitration agreement." Whatever the implications of that comment, the Fifth Circuit's decision in this case simply enforced "express limitations on [the] arbitrator's contractual mandate," Pet. App. 4a, quoting *Delta Queen Steamboat Co.*, 889 F.2d at 602. That holding gives no indication that the court of appeals is committed to a reviewing standard that is at variance with that of the other circuits.

[4] As the district court observed: "Although the arbitrator never expressly held whether the grievance was arbitrable, he nevertheless proceeded to make a determination on the merits. It appears from the award as though the arbitrator merely determined that a probationary employee could assert

noted, the "clear and unequivocal" language of the agreement precludes arbitration for probationary employees with respect to discharge actions; it states that "[t]he Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period *and these probationary employees shall not be permitted access to the grievance procedure in relation thereto.*" Pet. App. 6a (emphasis added). The arbitrator's failure to apply that provision "did not draw its essence" from the agreement; it ignored it. Accordingly, the judgment vacating the award is correct.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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rights [pursuant to the agreement]. Once he determined that a probationary employee could assert such rights, he addressed the second issue of whether there was a violation." Pet. App. 12a.

[5] Petitioner asserts (Pet. 19-20) that the court of appeals' decision is inconsistent with national labor policy. But this Court has never suggested that total abandonment of judicial oversight is necessary to promote arbitration, and has consistently allowed limited review of arbitral determinations. *Misco*, 484 U.S. 29; *United Steelworkers, supra.*

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